



CREATIVE CASE MANAGEMENT TECHNIQUES IN THE FACE OF LOOMING BUDGET CUTS

By Linda DeBene, Esq.

In spite of strong protest from the legal community, Governor Brown signed a 2012-13 spending plan in June 2012 that slashes \$544 million from the judicial branch budget. A few recent reports of the fallout:

- To absorb a \$26m cut in fiscal year 2013, Fresno Superior Court is closing seven branch courts.
- Los Angeles Superior Court must absorb \$100m in cuts. Its employee union, soon to lose hundreds of members, warned “an end to timely justice” with civil cases being delayed for years.
- San Francisco Superior Court seeks volunteers for a new mandatory settlement conference program as judicial officers will no longer be available due to other duties, and is dropping mediation referrals altogether from their programs.

Initial budget cuts that began in 2009-2010 resulted in courts being closed one day a month. Then there were furloughs. Subsequent cuts have resulted in reductions in not only court staffing/services, but in closing of branches, reduction in civil courtrooms, district attorney, probation, and public defender staffs being cut and criminal case loads are backing up.

What do civil litigators tell their clients about the significant cuts by the Governor’s “spending plan”? What can they really say other than, “this is no *spending* plan at all.” Are we back to the 1980’s with the only civil cases getting to trial being those butting up to the five year statute (and looking for ways around that), or having a statutory preference? Maybe it is not that bad yet, but who knows when it will turn around.

This article will attempt to address alternatives for managing and trying cases while still preserving the right to appeal, with some practice points on these alternatives. Yes, there are some: temporary judges under California Constitution, Article VI, § 21, and Judicial References under California Code of Civil Procedure §§ 638 and 639.¹

TEMPORARY JUDGES

Temporary judges have the same powers as trial judges, but must be appointed by the presiding judge. The parties must agree on appointment after the lawsuit is filed, the appointee must be a member of the State Bar, and must take an oath. All hearings are open to the public. Temporary judge judgments are appealable.

Assuming parties can agree on using a temporary judge, (“pro-tem”) and are able to select one to recommend to a presiding judge, there are several positive aspects to using one. A pro-tem may have subject matter expertise, there is continuity and consistency in rulings, trial can be held on an expedited schedule the parties can set, and appeal is preserved. Even if the pro-tem does not have a courtroom, the case can be tried in an office so long as all court formalities are followed and it is open to the public.

Cost effectiveness as compared to the typical judicial process is a matter to weigh. In light of the possibility that civil cases may not likely get an available courtroom for extended periods of time and motions may only be set quarters (not just months) away, the matter can be expeditiously moved along because the pro-tem does not have the same time constraints of sitting judges or commissioners. Cost expenditures have to be weighed against delay. A pro-tem can manage the case, keeping in touch as needed with the presiding judge if a courtroom/jury is essential, set motions in a reasonable fashion, and can review and sign orders in days not months.

If counsel and their clients select to use, and agree upon a pro-tem, a positive aspect is having someone who will have time to listen and understand the case, and who will not have the constraints of an overcrowded docket. The pro-tem is likely to be more accessible and can see the whole picture of the case, not just discovery in a vacuum or in trial at some distant point in time. In complex/technical issue cases, the pro-tem may also have practice area expertise a judicial officer may not have (or have time to

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THE RESOLUTION EXPERTS



figure out) due to other assignments/responsibilities. And, the pro-tem can typically get the case to trial faster.

There are interactions with the court and the courthouse that may be “cons” to a temporary judge assignment. In a trial which needs a jury, court personnel are involved such as bailiffs, clerks (to handle evidence and the jury) and jury commissioners. Typically jury trials by pro-tems end up at the courthouse. But with cutbacks in court personnel, while there may be an empty courtroom to use, there likely will not be a bailiff, no clerk to handle evidence, and no one to handle the jury. A pro-tem is useful when formality of a trial is desired, but without court personnel, one might conclude that a Presiding Judge could deny the appointment recommendation of counsel and let the case wait. Yes, the parties and their clients can waive jury, but Presiding Judges may wish *voir dire* on this issue before permitting the waiver to avoid appellate complaint of incompetence of counsel or waiver without full knowledge of the effect on the party’s case.

Other “cons” arise because some lawyers are terrified of the unknown. Temporary judges rarely have a public track record. While their decisions are appealable, it is difficult to ascertain the “word on the street” about their eccentricities in a “judicial” role, as opposed to sitting judges. This con must be weighed against the delay being caused in the courts, the agreement of the parties in making a recommendation to the court for appointment, and the needs and desires of the clients to obtain a trial expeditiously instead of more months/years of unknown delay.

JUDICIAL REFERENCES (VOLUNTARY AND CONSENSUAL)

Judicial References have a fuller range of flexibility and less ties to the courthouse arena. Judicial References can be for the whole case or for portions of the case. An agreement to appoint a Judicial Referee can be in a pre-dispute contract, or the parties in a filed lawsuit (or anticipating one) can stipulate to a referee either for all purposes or for limited purposes under CCP § 638.² There must be a lawsuit pending at some point as the referee acts as an arm of the Court.

Trials and hearings for Judicial Referees must still be “noticed” to the Court appointing the referee, with documents that the parties will send to the referee first filed in the relevant clerk’s office. Cal. Rule of Court 2.400. Under a reference all pleadings are still public and hearings are open to the public. 2010 Public Access Provisions, California Rules of Court 10.500 *et seq.* See also Cal. Rule of Court 3.931. While there is no requirement that the trial or hearing of the matters be at the courthouse, arrangements must be in place for the public to attend. Cal. Rule of Court 3.907. In fact, under Rule 3.907, a party who has elected to use a § 638 reference is “deemed to have elected to proceed outside court facilities.”

CCP § 638(a) referees can be for all purposes (“general consensual reference”) or CCP § 638(b) referees for specific purposes (“special consensual reference”), such as discovery, settlement (not mediation³), and accountings, as some few examples. They do not need to be attorneys, and they can be chosen by the parties without court approval (although a court order appointing is needed), or on motion. Section 638 references must be consensual,⁴ and no California court has the power to make an uncontested-to “general reference.” No oath is required, although any referee who serves as an “arm” of the Court is required to comply with all ethical requirements of a judicial officer under California Canons of Judicial Ethics, Canon 6.

General references under § 638(a) provide the referee with power to make binding decisions after hearing as if the case were being tried to a court. *Sy First Family Ltd. Partnership v. Cheung* (1999) 70 Cal.App.4th 1334, 1341, 83 Cal. Rptr.2d 340, 344. Upon conclusion of the trial, the referee is required to make a statement of decision, which may be reviewed upon a motion for new trial. The statement of decision has the same meaning as in CCP § 632, except that § 638 does not mandate that a party make a request for statement of decision before one is required. The Referee’s final decision is deemed the “decision of the court” and is appealable. CCP §§ 644, 645. *Aetna Life Ins. Co. v. Superior Court (Hammer)* (1986) 182 Cal.App.3d 431, 436, 227 Cal.Rptr. 460, 464.

While a § 638(a) referee for all purposes makes binding decisions, a § 638(b) Special Referee makes recommended decisions. But when parties consent to either reference, they are able to define the scope and subject matter. It is at this early stage in the process that the parties and the referee need to take time and work collaboratively to carefully draft the Order of Reference or Order of Appointment. Major complaints of counsel are that the procedures for issuing, correcting and reviewing the referee’s order not clear, not set, or that there are too many steps, making the process inefficient and expensive. Streamlining the process plus efficiency of time and expense are the most positive aspects of a reference if used under a clear and concise order that the parties negotiate and agree upon.

JUDICIAL REFERENCES (COURT-ORDERED)

Involuntary references (i.e., non-consensual) must be authorized by statute and be limited in scope. One statutory scheme is CCP § 639 which provides for: examination of accounts [§ 639(a)(1)], taking an account [§ 639(a)(2)], determining factual dispute(s) arising on motion at any stage of an action [§ 639(a)(3)], conducting “special proceedings” (i.e., statutory actions creating remedies unavailable at common law or in equity including eminent domain, unlawful detainer, lien foreclosure, enforcement or arbitration and writs of review [§ 639(a)(4)], or discovery disputes⁵) when the court determines it is necessary

but only in “exceptional circumstances” [§ 639(a)(5)]. Unfortunately counsel cannot rely on “efficiency” as an exceptional circumstance.⁶

Another statutory scheme which permits courts to appoint referees is California Constitution, Article VI, § 22, which authorizes court employees (court commissioners, probate referees, juvenile referees, hearing officers, etc.) to perform various “subordinate judicial duties” as authorized. See also CCP § 259 and CCP § 873.010 *et seq.* These provisions may provide for subordinate judicial duty officers, but the fact that some commissioner or referee positions are, or may be, the target of severe budget cuts, may force courts to turn to § 639 involuntary references in situations warranted. Otherwise parties will be left with voluntary/consensual references under CCP § 638.

What can civil attorneys and their litigating clients do in the face of the current budget crisis to get their cases tried and preserve their rights to appeal?

CASE MANAGEMENT & OTHER PRACTICE POINTERS:

- If you have a written pre-dispute agreement (enforceable under § 638 only if part of a “written contract or lease”), or even if you do not, meet and confer with other counsel (or, if pre-litigation, with opposing parties), and work out an agreement for a § 638 general or special reference. If the goal is for a reference for all purposes, start immediately to select a mutually agreeable referee.⁷
- If you have no pre-dispute agreement, make a post-dispute agreement for reference. This can be oral or written. Under § 638, an agreement may be entered in the record or minutes of the court proceedings.
- When possible, agree amongst counsel to the referee or temporary judge and recommend to the Court:
 - You cannot choose your judge, but you can select your referee or temporary judge.
 - When deciding, recall that a § 638 referee cannot conduct a jury trial. (California Rule of Court 3.907)
 - If counsel trust the referee it will be productive. Often, if the parties cannot agree and/or the Court appoints over objection, it can be counterproductive and inefficient from a proceedings or cost perspective.
 - Focus on solving the problem you are presenting when recommending a SM/referee to the Court. If you are already in a case that presents a specific issue, the Court can be asked to appoint a referee for a particular purpose, not the whole case.
- Select an experienced SM/referee who likes doing the work. Not every ADR neutral is willing to handle the detailed work that comes with a SM/referee assignment involving complicated E-discovery or contentious discovery in general.

- Select an experienced SM/referee:
 - who is not afraid to make tough calls and who will move the ball forward expeditiously;
 - who has time to get to the rulings;
 - who has subject matter knowledge in the practice area of your case.
- To maximize knowledge and not pay for a learning curve in cases involving E-discovery, consider someone who is technologically savvy, trained in E-discovery and ESI, and aware of ever-changing trends in methods for document production, storage and search methods.
- Because meeting and conferring between counsel is less expensive than formally briefing pre-trial motions on protocols, discovery, privilege and privacy claims, select a SM/referee that will keep the parties involved in the process by:
 - requiring meet and confer sessions on issues prior to making motions;
 - encouraging an early discovery plan, stipulations on dates and protocols for e-discovery;
 - holding informal conference calls rather than face to face hearings on arising issues so they can be dealt with in real time and not fester.
- When possible do not limit the SM/referee to deciding disputes, but give specific authority to manage, organize and schedule as a complex department would do.
 - A SM/referee handling the whole matter will be better able to know the whole case and see when discovery issues may impact the structure of the decisions in the case later on.
- Authorize the SM/referee to act flexibly and informally to save time and money by such means as letter briefs instead of full briefing, standby time for discovery so rulings can be made on the spot during a deposition on the record rather than doing expensive and time-consuming motion work.
 - Ask SM/referee if s/he will stand by for depositions at no cost unless called for needed ruling.
 - If the SM/referee’s decision is a nonbinding one, determine in advance if SM/referee will do tentative rulings on motions. Set up a process for a short window to object to tentatives before being sent to the Court for approval. Many tentatives will draw no objection, and this will save time with judicial approvals when the appointing judge has a backlog of orders to consider/approve. A cover e-mail/letter from the SM/referee direct to the Court stating the proposed order is attached and time for objection has expired without any objection will be expeditious, and the parties will be motivated to move forward on the motion/discovery ruling without having to wait for the Court to act.

- If there are tentatives and objections, there can be a hearing on short notice rather than waiting for a court opening many months out, or for an order that may be delayed or lost in a busy or understaffed clerk's office, thus avoiding delay.
- Conduct regularly scheduled status conferences to move/track action items. Do not let disputes fester.
 - Set up a process in advance for bringing disputes/issues to the attention of the SM/referee informally so shortened time briefing schedules may be set or tentative decisions announced informally. Time and expense to the client can be saved by informal resolutions documented by short e-mail orders.
 - Do not be afraid to educate the SM/referee and let him or her know of impending problems so that what might look like small issues do not bubble up and become big problems down the road.
- Remember that civility is not inconsistent with self-interest and it is consistent with cost savings. It is more frequently than not possible to simultaneously advance your client's interest while fostering productive discovery agreements with opposing counsel.
 - Consider informal discovery exchanges instead of expensive motion practice.
 - Exchange discovery electronically and via e-mail, setting up in advance such time saving measures as service times by e-mail that may be shorter or longer as the case calls for instead of statutory deadlines, using "read receipts" or acknowledgments of receipt instead of expensive overnight carriers or delivery persons.
 - Refrain from immediately defaulting to a sanction request in every instance of discovery crisis, instead opting for compliance rather than raising the level of adversarial angst. Requests for sanctions are repeatedly denied for one reason or another and are quite expensive in light of the high risk of denial. Invest in your credibility level by selecting your battles carefully. When the appropriate time comes for a truly winnable sanctions request, your client will not have a track record of expensive losses to overcome.
- Once you have made the decision to avail yourself of one of these alternative options:
 - use referrals or suggestions from neutrals that do this work to aid in the selection process;
 - ask someone you are vetting if they have form orders that they use that you can review;
 - call your colleagues or other attorneys you trust for recommendations or procedural formats that have worked;
 - call your favorite ADR provider and ask to speak with a Case Manager or Case Assistant that is familiar with SM/referee appointments.

There are many procedural, drafting and detail issues concerning the use of SM/referees and temporary judges

that are important to consider, but space is limited here. Those experienced in using SM/referees or temporary judges know the process is complex, so reach out and tap the source.

The alternatives presented may not be right for every case, the benefits may not outweigh the costs. It remains a decision between litigation counsel and their client on a case-by-case basis. The overriding practice point is a reminder that yes, there are alternatives to the current budget crisis and courtroom delays which can be used to answer the client question, "What can we do to get this done?" ■

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¹ Arbitration is also an option. Most arbitrations are binding, but counsel can draft around the binding nature of arbitration, or stipulate around it, providing for a right to appeal. Some ADR providers, including JAMS, have optional appeal procedure should parties desire to arbitrate and still maintain an appeal right. <http://www.jamsadr.com/rules-optional-appeal-procedure/>

² Or under Rule 53(a)(1)(A) and (C) of the Federal Rules. Federal Appointments of Special Masters will not be discussed in detail here mainly because federal courts have not begun to experience the extreme budgetary cuts as are happening in California's state courts.

³ Cal. Rule of Court 3.900 and 3.920 specifically prohibit a court from appointing a referee to conduct a mediation.

⁴ A court's power to refer a case to a referee is constrained by the constitutional principle that judicial power may not be delegated. California Constitution Article VI, § 22; *De Guere v. Universal Studios, Inc.* (1997) 56 Cal.App.4th 482, 496, 65 Cal.Rptr.2d 438, 447. Also see *Aetna Life Ins. Co. v. Superior Court (Hammer)* (1986) 182 Cal.App.3d 431, 437, 227 Cal. Rptr. 460, 464.

⁵ Discovery disputes under § 639 are non-binding decisions and have been ordered by the court under the provisions of § 639(a)(5) without the consent of all of the parties. While some parties may consent, some may not, so counsel are forced to seek a reference on motion, or the court can order the reference *sua sponte*. The referee's decisions must go to the court for final order. Since the final order on discovery is of the court, the decisions are appealable and subject to writ proceedings. Discovery disputes under § 638 are voluntary and decisions of the referee are binding, appealable and subject to writ proceedings.

⁶ See *Aetna Life Ins. Co. v. Superior Court (Hammer)*, supra, Id. at 437.

⁷ Prior to the budget crisis, courts would generally (but not always) honor the parties' agreement for appointment of a § 638 referee, either general or special. In light of staffing levels, closed civil courtrooms and other budgetary impositions, judges may welcome counsel cooperatively moving a case to a referee or judge pro-tem. Considerations may not be the same for a § 639 motion for reference as the decisions of the court-ordered referee are not binding. A judge may not see the wisdom of having to reconsider the referee's decisions, particularly because at least one party has objected and the referee has been appointed over that objection, deciding instead to keep the case in the judicial system.